

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 816 of 2004
WITH
CRIMINAL MISC. APPLICATION No 8551 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

- =====
1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

SURABHAI RAVIKUMAR MINAWALA

Versus

STATE OF GUJARAT

Appearance:

1. Special Criminal Application No. 816 of 2004
MR BB NAIK for Petitioner
MS HARSHA DEVANI, APP for Respondent No. 1
NANAVATI & NANAVATI for Respondent No. 2
NOTICE SERVED BY DS for Respondent No. 3
-

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 24/09/2004

CAV JUDGEMENT

(Per : HON'BLE MR.JUSTICE AKSHAY H.MEHTA)

Rule. Miss Harsha Devani, Ld. APP waives service of rule on behalf of respondents nos. 1 and 3 and Mr. SI Nanavati, learned senior advocate waives service of rule on behalf of respondent no. 2.

2. This petition is filed under the provisions of Article 226 of the Constitution of India praying this Court for issuance writ of habeas corpus. Petitioner is the mother of a child named Kiran (in the affidavit-in-reply stated as 'Karan'), aged about 9 months. It is her say that she has married to respondent no. 2 on 28th December, 2002 and during their wedlock child Kiran was born on 12th November, 2003. It is averred by the petitioner that after the child was born within short time she was driven out of the house by respondent no. 2 and his family members. Thereafter she made efforts to get the custody of the child but in vain. After all efforts having failed, now she has been constrained to approach this Court as a last resort. It is further averred in the petition that since the child is aged about 9 months, she is natural guardian of the child. She has for that purpose placed reliance on the provisions of section 6 of the Hindu Minority and Guardianship Act, 1956 [hereinafter referred to as "the Act"]. In the end she has prayed that appropriate writ of habeas corpus be issued against respondent no. 2 to produce the minor child Kiran before this Court and direct him to hand-over the custody of the child to her.

3. The petition has been resisted by the otherside by filing affidavit-in-reply wherein mainly it is stated that the present petition is not maintainable since alternative efficacious remedy is available to the petitioner. It is further averred that there is no need to issue writ of habeas corpus since the child is not in illegal custody of the father and the welfare of the child would be maintained in the best possible manner, if the child remained with respondent no. 2 and his family. It is also averred that it is the petitioner who has left the family with her father and brother and she is not prepared to come back to family of respondent no. 2. It is, therefore, prayed that the petition be dismissed.

4. Before we deal with the matter on merits, we may put certain facts which have transpired before us

while we made efforts to conciliate between the parties. Respondent no. 2 pursuant to the notice dated 11th August, 2004 appeared before us through his advocate Mr. RK Mishra on 16th August, 2004. The petitioner as well as respondent no. 2 were also present on that day. With a view to find out whether there was any possibility of reunion of the couple, we called them in the chamber separately one after the other. First we interrogated the petitioner. She reiterated the contents of the petition by saying that she was tortured in the family and it was not possible for her to stay in the said family. She also stated before us that within about less than two months of the birth of the child, she was driven out of the matrimonial home. Ofcourse she acceded to our suggestion to reconcile with the situation and to make effort to have the reunion possible. Similarly we interrogated respondent no. 2. With initial reluctance he also ultimately showed some inclination to have a dialogue with the petitioner. To enable them to see each other, we adjourned the matter to 18th August, 2004. On that day both the parties were present together with their relatives. It appears no fruitful meeting took place during intervening period. Whatever transpired on that day i.e. 18th, has been recorded by us, which verbatim can be reproduced as under:-

"The parties are present before the Court with their respective advocates. Miss Devani, Ld. APP for the State is also present. Petitioner's uncle Rameshbhai and father of respondent no. 2 - Dilipbhai Minawala are also present. After mutual discussion the parties have agreed to the following interim arrangement :-

Respondent no. 2 will hand over custody of the minor child Kiran to the petitioner today i.e. on 18th August, 2004. The petitioner will take the child alongwith her to Bombay and she will stay with the child at Bombay upto 30th August, 2004. She will return to Ahmedabad on 31st August, 2004 and after her return, she, respondent no. 2 and their child will stay at Dhananjay Bungalows. Put up on 8th September, 2004 at 4.45 p.m."

5. Before the next date of hearing i.e. 8th September, 2004, respondent no. 2 filed Criminal Misc. Application No. 8551 of 2004 on 3rd September, 2004. This application was filed for complaining that as per the arrangement the petitioner had not returned to Ahmedabad on 31st August, 2004 with the child. It was averred that she had disobeyed and deliberately flouted

the order of this Court dated 18th August, 2004 and it was prayed that this Court may seek explanation from the petitioner why she had blatantly flouted the order of the Court and secondly that the Commissioner of Police be directed to go to Bombay at the cost of the petitioner to take the custody of the child.

5.1. Since the filing of this application was not at all in good taste, especially when the Court was making effort to bring about amicable solution in the interest of the child, we deprecated the attitude of respondent no. 2 and his advocate in no uncertain terms. In fact on the next date of hearing when the parties were again present before the Court, the petitioner explained that the child was ill and it was hospitalized and she had also produced the medical certificate. This was the position on 31st August, 2004 and sometime prior to it. She, however, complained that despite her repeated efforts to contact respondent no. 2 on phone, he never responded nor did he go to Bombay though orally agreed to go there and bring the child and petitioner with him on 31st August, 2004. Respondent no. 2 did not deny this fact. With a view to give them one more chance, we again adjourned the matter to today and also asked respondent no. 2 to stick to his promise and to go to Bombay to bring the child and petitioner and to stay as per the arrangement agreed to earlier and also to sort out whatever differences that were there between the parties. On 21st September, 2004 Mr. S I Nanavati, the senior advocate, who has now replaced Mr. RK Mishra for respondent no. 2, filed a note dated 15th September, 2004 and made an effort to ascertain from the Court whether any direction, oral or otherwise, was given to respondent no. 2 to go to Bombay and bring the child. Because Mr. Nanavati, in no uncertain terms informed the Court that his client was not at all willing to go to Bombay to bring her back. However, if there was any direction issued by the Court, he would abide by it. We made it very clear to him that no direction was ever given by the Court but it was only, in view of mutual understanding that was arrived at between the parties, it was suggested by the Court to respondent no. 2 to go to Bombay to bring the child and the petitioner. The only idea behind it was that such a measure would lessen the distance between them and it may inspire some confidence in the husband and wife to re-establish their cordial relations. All the efforts that have been put in by us have unfortunately failed. We may also state that we do not hold petitioner responsible for the same.

5.2. At this juncture it is worthwhile to

quote some statements made by respondent no. 2 in affidavit-in-reply. Respondent no. 2 in para. 4 of affidavit-in-reply has made following statements :-

"4. My Lords, may I submit to this Hon'ble Court that, my son is in the conditioned care and conditioned atmosphere. Hygienic food, health and care with hygienic space in poss area, only deficiency in his life is love of my wife i.e. child's mother. My Lords, my father bent down on knees and requested my father-in-law and brother-in-laws to send my wife back because enough is enough, if there had been the slight difference in the family and with me, the baby should not suffer the love of mother. I beg my wife Surbhi to come back and join the family and give the most valuable love of mother to our child and I solicit very humbly the kind intervention in this regard of this Hon'ble Court.

He has further stated in the same paragraph as under :-

" ... My Lords, I very humbly state, submit and undertake that, I am ready to sacrifice anything for my wife for sake of newly born baby so that, the child is not deprived of love of mother, father and other family members."

We wish respondent no. 2 had put into practice what has been stated above. The affidavit smacks of arrogance of affluence and sounds absolutely hollow. Repeated attempts have been made in affidavit-in-reply to run down the family of the petitioner by stating that financially and culturally it is nowhere near the family of respondent no. 2.

5.3. We may also make it clear that we have reproduced in foregoing paragraphs only those facts which are contained in the pleadings of the parties and also told to us during our conversation with them in the chamber. Other facts which are disclosed in confidence to us are not at all referred to in this judgment as it may harm the case of either of the parties in future and otherwise also it will not be proper for us to do so.

6. So far the merits of the case are concerned, it is submitted by Mr. BB Naik, learned advocate appearing for the petitioner in place of Mr PR Nanavati that the petitioner is a mother, the child is aged hardly 9 months and even as per the statutory

provisions, namely section 6 of the Act the natural guardian is the mother and the child's custody should remain with the petitioner. Since respondent no. 2 and his family members do not permit her to take the custody, this Court may issue writ of habeas corpus and also to direct respondent no. 2 to hand-over custody of the child to the petitioner. It may again be noted here that by virtue of the mutual arrangement arrived between the parties on 18th August, 2004, the custody is already with the petitioner. Mr. Naik has further submitted that even in the proceedings of the petition for writ of habeas corpus this Court is empowered to direct respondent no. 2 to hand-over custody of the child to the petitioner. For that purpose he has placed reliance on the following judgment :-

Gohar Begum v/s. Suggi reported in AIR 1960 SC 93

He has also placed reliance on other comparatively recent judgments :

- i. Mohd. Ikram Hussain v/s. State of U.P.
reported in AIR 1964 SC p. 1625
- ii. Dushyant Somal v. Sushma Somal reported in AIR
1981 SC p. 1026
- iii. Veena Kapoor v/s. Varinder Kumar reported in AIR
1982 SC p. 792
- iv. Poonam Datta v/s. Krishanlal Datta reported in
AIR 1989 SC p. 401 and
- v. Sarita Sharma v/s. Sushil Sharma reported in AIR
2000 SC p. 1019.

6.1. As against that, Mr. SI Nanavati has stated before us that he now does not wish to prosecute Criminal Misc. Application No. 8551 of 2004 and the same may be disposed of as not pressed. He has, however, made submission on merits so far the petition is concerned. He has drawn our attention to certain paragraphs of the affidavit-in-reply and has submitted that these averments have not been controverted by the petitioner and the same would show that the welfare of the child can best be looked after if the child remained with respondent no. 2 and his family. He has further submitted that this being a proceeding under Article 226 of the Constitution of India for issuance of writ of habeas corpus, the prayer for handing over the custody cannot be entertained since there is alternative remedy available. He has further submitted that the respondent no. 2, being father of the child, his custody of it, cannot be termed as illegal. He has further submitted that respondent no. 2's family is reputed one and it is in a position to take care of the child in the best

possible manner. He has requested the Court that in the event it decides to allow the petition, it may not observe anything in respect of who will be in a better position to look after the welfare of the child. According to him, such observations may harm respondent no. 2's case since the issue is required to be decided after taking the evidence in the trial proceedings as and when such application is filed under the Act by the petitioner. He has in the alternative submitted that if this Court is inclined to look into the aspect of welfare of the child in the present position, it must be done keeping in view ratio laid down by the following judgments :-

- i. Poonam Datta v. Krishanlal Datta reported in AIR 1989 SC p. 401
- ii. Vijayaben P. Kotak v Purshottam Kotak reported in 2003 (2) G.L.H. p. 323
- iii. Smt. Sarla v. Anandrai reported in 1977 XVIII G.L.R. p. 581.

6.2. We have also heard Miss Harsha Devani, Ld. APP for the State. According to her, custody of the child should continue to remain with the petitioner.

7. Having given our careful consideration to this delicate issue and having fully considered the submissions made by the learned advocates, it is clear that the petitioner is not living with respondent no. 2 and his family. According to her, she has been driven out. As against that, respondent no. 2's say is that she has voluntarily left his family. She has left the matrimonial home with her father and brother with the intention of not returning to it. Though there is word against word and these are not the appropriate proceedings in which this issue can be decided as necessary evidence will have to be led by the parties to establish their respective averments, it is very unnatural and difficult to swallow the say of respondent no. 2 that the petitioner had gone away leaving the child of 45 days with respondent no. 2. No mother would take such a step more particularly when the mother like the petitioner has ultimately approached this Court by way of this petition to take the custody of the child. Her say that efforts were made to negotiate also appears to be true, because as stated above, she had shown all the willingness to accede to the suggestions that had fallen from the Court and to abide by the arrangement that has been referred to above. It is, therefore, difficult for us to accept the story of respondent no. 2.

7.1. Now the question with regard to the

interest of the minor is required to be considered. It is stated by the respondent no. 2 in his affidavit-in-reply that his family is having good reputation. They have an established business of jewellery over 100 years. The family comprises parents and sisters and brother of respondent no. 2, who can look after the child. Since they are financially very well-off, they can secure good education for the child and provide all facilities. If the claim of respondent no. 2 is to be weighed vis-a-vis the claim of the petitioner regarding safeguarding the interest of the child, it is very clear that petitioner also can provide all the basic, necessary facilities and amenities to the child. It is to be seen here that respondent no. 2 is a businessman and it transpires from the affidavit that the child is likely to be with its grand mother and paternal aunts. Between the mother on the one side and grandmother and paternal aunts on the other, undoubtedly the scale would tilt heavily in favour of the mother. From the conversation which we had with the petitioner, it appears to us that she is well educated, her parents' family stays in Bombay, which is centre of education and even from the point of view of the health of the child, best of the medical facility can be had in that city and when needed petitioner can secure it for her child as could be seen from the medical certificate and other papers she had shown to us. These aspects cannot be ignored by us to decide even prima-facie the issue with regard to welfare of the child and who will be in a better position to take care of it. As stated above, our answer is obviously in favour of the petitioner.

7.2. Apart from this, under the relevant statute viz. Hindu Minority and Guardianship Act, 1956, section 6 has defined natural guardian of a Hindu minor.

"6. Natural guardians of a Hindu minor :-

The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint-family property), are -

(a) in the case of a boy or an unmarried girl
- the father, and after him, the mother provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother :

(b) (c) xxx xxx xxx xxx"

Thus, the legislature in its wisdom has thought it fit the mother to ordinarily have custody of the child if it

is below the age of five years. There is nothing extraordinary in this case which may prompt us to deviate from the above statutory provision. Merely because father of the child i.e. respondent no. 2 is in better financial position than the mother, it does not mean that the child's interest will best be served if it remained with father and his family. No amount of wealth and 'mother like love' can take the place of mother's care and love for the child. When she is in a position to provide basic necessities and amenities to the child for its comfort and good upbringing, luxuries spoken of in the affidavit of respondent no. 2 cannot persuade us to deprive the mother of her child and allow the custody of the child to remain with him. In our opinion, she will be in a better position to discharge parental obligation.

7.3. We have carefully considered the authorities cited by Mr. Naik as well as Mr. Nanavati. The Apex Court in Gohar Begum's case [supra] has dealt with the question whether custody of the child can be ordered to be given to the petitioner in proceedings under Article 226 of the Constitution for writ of habeas corpus. Ofcourse the Apex Court was considering scope of application for custody of a minor filed u/S. 491 of the Code of Criminal Procedure, 1898, but in that decision the Apex Court has observed as under :-

"13. It is further well established in England that in issuing a writ of habeas corpus a court has power in the case of infants to direct its custody to be placed with a certain person. In R. v. Greenhill (1836) 4 Ad & El 624 at p. 640 : 111 ER 922 at p. 927 Lord Denman C.J. said :
"When an infant is brought before the Court by habeas corpus, if he be of an age to exercise a choice, the Court leaves him to elect where he will go. If he be not of that age, and a want of direction would only expose him to dangers or seductions, the Court must make an order for his being placed in the proper custody."

See also (1857) 7 El. & Bl. 186 : 119 ER 1217.

In Halsbury's Laws of England. Vol. IX. Art. 1201 at page 702 it is said :

"Where, as frequently occurs in the case of infants, conflicting claims for the custody of the same individual are raised, such claims may be enquired into on the return to a writ of habeas corpus, and the custody awarded to the proper person."

Section 491 is expressly concerned with directions of the nature of a habeas corpus. The

England principles applicable to the issue of a writ of habeas corpus, therefore, apply here. In fact the courts in our country have always exercised the power to direct under S. 491 in a fit case that the custody of an infant be delivered to the applicant: see Rama Iyer v. Nataraja Iyer, AIR 1948 Mad 294, Zara Bibi v. Abdul Razzak, 12 Bom LR 891 and Subbaswami Guondan v. Kamakshi Ammal, ILR 53 Mad 72 : (AIR 1929 Mad 834). If the courts did not have this power, the remedy under S. 491 would in the case of infants often become infructuous."

7.4. From the ratio laid down by the Apex Court in the case of Gohar Begum [supra], it is very clear that even in the proceedings under Article 226 for writ of habeas corpus this Court is empowered to grant custody in favour of the petitioner.

7.5. Again in the case of Dr. Mrs. Veena Kapoor v/s. Varinder Kumar Kapoor [supra] the Apex Court has held that the dismissal of mother's petition under Article 226 of the Constitution of India by the High Court on the ground that father's custody was not illegal, was erroneous. It has held as under :-

"2. It is well settled that in matters concerning the custody of minor children, the paramount consideration is the welfare of the minor and not the legal right of this or that particular party. The High Court, without adverting to this aspect of the matter, has dismissed the petition on the narrow ground that the custody of child with the respondent cannot be said to be illegal."

We have already held above that petitioner being the natural guardian of the child and especially when we are of the opinion that the child's welfare can be amply looked after by the petitioner.

7.6. We have no quarrel with the proposition of law enunciated in the authorities cited by Mr. Nanavati. The concern felt by the Court with regard to child's interest and welfare, they being of paramount importance, is common in all these decisions and we have kept in view exactly the same and nothing else. Thus when we hold, following the said proposition of law, that the child's welfare will remain in better way with the petitioner, we have all the authority to direct that the custody will remain with the petitioner. We, therefore,

now direct that by way of interim arrangement the custody of the child Kiran is already given to the petitioner and now it will remain with her. We, however, make it clear that respondent no. 2 will be at liberty to file appropriate proceedings under the Act or under any other statutory provision to have the custody of the child and the observations made by us in this judgment will not come in the way of the forum while deciding such application that may be filed before it.

8. Before we conclude this judgment, we may deal with the alternative submission of Mr. Nanavati that in the event of our holding in favour of the petitioner, direction may be given that for 15 days in a month the custody of the child be given to respondent no. 2 who will go to Bombay and bring the child at his own expense. It is also submitted that during Ganesh Utsav, which is presently going on, the custody of the child be given to respondent no. 2 for a period of 15 days. This submission has been opposed by Mr. Naik, as in his submission, that may create complications and the child will be shunted between the two families every 15 days. The decision relied on by Mr. Nanavati for this purpose is in the case of Poonam Datta [supra] and it is distinguished by Mr. Naik by saying that if the father so desired he could come to Bombay and meet the child, so also the other family members, because unlike the case before the Apex Court where it was aged grand parent, these persons are in the position to go to Bombay and meet the child. We are afraid that we cannot accept the alternative submission of Mr. Nanavati, but we find some substance in the submission of Mr. Naik because such a direction would unnecessarily toss the child like shuttlecock between the two families that would adversely affect health of the child at this tender age and mentally also it will not be able to adjust in either of the families. In this very decision it has been laid down by the Apex Court that parties should refrain from doing anything which may adversely affect the child physically or mentally.

9. Lastly, we may consider whether this is a fit case where respondent no. 2 can be saddled with the liability to pay the cost of the petition to the petitioner. In our opinion, our efforts and time spent to bring about amicable solution between the parties have gone waste because of the non-cooperative attitude of respondent no. 2 though this Court was given adequate assurance that he would make efforts in that direction by going to Bombay and having a dialogue with the petitioner, etc. This assurance has been given not once

but twice. That apart in the midst of such efforts he has come out with application making allegations against petitioner of deliberately flouting this Court's order and to take stern action against the petitioner. This Court had never issued any order of which the petitioner is alleged to have committed any breach. The said application as stated above, has now not been pressed. Suffice it to say that because of the assurance given by respondent no. 2 we were hopeful that the matter would be resolved and for that purpose the hearing of the petition was adjourned from time to time and that has required the petitioner to come down to Ahmedabad every time from Bombay alongwith some escort in the form of her relative and that has caused her financial burden. As observed above, she is not at fault for the failure of settlement. In that view of the matter, we are of the opinion that some compensation is required to be awarded to her by way of cost. We, therefore, allow this petition and direct respondent no. 2 to deposit in the Registry of this Court a sum of Rs.10,000/= [Rupees Ten Thousand only] towards the cost of the petition within one week from the date of the order. On such amount being deposited, the Registry shall pay the same to the petitioner. Respondent no. 2 is also directed to submit the compliance report of this direction immediately after the expiry of one week.

10. In the result, this petition is allowed.
Rule made absolute.

As stated above, Mr. Nanavati does not press Criminal Misc. Application No. 8551 of 2004. Hence, application is disposed of as not pressed.

[KSHITIJ R. VYAS, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.